No. 82-1676

In the Supreme Court of the United States

OCTOBER TERM, 1982

SOVEREIGN NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks the return of FBI-made photocopies of business records seized from its premises during two judicially authorized searches, which it contends violated the First and Fourth Amendments.

1. Pursuant to two search warrants issued by a federal magistrate in the United States District Court for the Northern District of Ohio, FBI agents seized business records and pornographic magazines and films from petitioner's office in March 1975. Shortly thereafter, petitioner filed a motion in the district court, under Fed. R. Crim. P. 41(e), for the return of its property, which petitioner contended had been seized unlawfully (Pet. App. A74-A91). Following an evidentiary hearing, the district court held

that the searches were lawful and it issued an order denying petitioner's motion (C.A. App. 127-195, 197).[1]

On March 26, 1976, while an appeal from that order was pending, petitioner was indicted in the United States District Court for the Northern District of Ohio on charges of violating the federal obscenity laws. In view of the pending prosecution, the court of appeals held that it was without jurisdiction to entertain petitioner's interlocutory appeal. *Sovereign News Co.* v. *United States*, 544 F.2d 909 (6th Cir. 1976), cert. denied, 434 U.S. 817 (1977).

In July 1978, petitioner was acquitted by a jury on the obscenity charges. Following the acquittal, the government returned all films, magazines and business records seized from petitioner during the March 1975 searches. The government, however, retained FBI-made photocopies of petitioner's business records. In August 1978, petitioner moved to reinstate its appeal from the district court's 1975 order denying its motion for return of property. On September 21, 1978, the court of appeals denied the motion "without prejudice to the right of [petitioner] to renew its motion in the district court for the recovery of its property alleged to have been seized unlawfully and unconstitutionally by federal agents, and, in event of the denial of said motion by the district court, to perfect an appeal to this court from such denial" (Pet. App. A40-A41).

Petitioner renewed its motion for return of property in the district court. After a brief hearing, the district court again found that the searches and seizures were lawful, and it denied petitioner's motion (Pet. App. A42-A67). The court of appeals upheld the legality of the searches but remanded the case to the district court for further proceedings (*id.* at A3-A39). After examining each of petitioner's

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[1] "C.A. App." refers to the appendix filed in the court of appeals.

First and Fourth Amendment claims, the court of appeals held that the two 1975 search warrants were valid and that they had been lawfully executed (*id.* at A9-A33). The court ruled, however, that despite the lawful seizure of the business records, petitioner has a right to possession of the photocopies unless the government can show that "the copies are needed for an ongoing or proposed specific investigation" (*id.* at A37). In so ruling, the court rejected the government's claim that FBI-made photocopies of legally seized business records are government property and can be retained by the FBI. Accordingly, the court remanded to the district court for further proceedings pertaining to the government's need for the photocopies (*id.* at A39).

2. Petitioner contends that the two 1975 searches of its business premises violated the First and Fourth Amendments. Whatever the merits of these claims, there is no reason for this Court to rule on any of the questions presented at this time. First, petitioner has not been convicted of a federal crime on the basis of the evidence seized in the 1975 searches and there are currently no federal charges pending against petitioner in which the evidence might be used. Hence, the applicability of the exclusionary rule to the fruits of the searches is not presently at issue. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977). If, at some future time, the government were to attempt to introduce the fruits of those searches against petitioner in a criminal prosecution, petitioner could contest the lawfulness of the searches by way of a motion to suppress.

Moreover, insofar as petitioner is seeking to vindicate its property rights in the seized materials, every item that was removed from petitioner's premises in 1975 has been returned. Consequently, with respect to the seized business

records and pornographic materials, petitioner's motion for return of property is now moot.[2]

With respect to the government's obligation, if any, to give petitioner the FBI-made photocopies of petitioner's business records, that issue is not yet ripe for review. Both courts below have determined that the originals were legally seized. Although the government argued below that it is entitled to retain its photocopies of petitioner's lawfully seized business records, the government will abide by the decision of the court of appeals in this case and will turn over the photocopies to petitioner if the district court determines that they are not needed by the government for "a specific investigation" (Pet. App. A39). Should petitioner prevail at this hearing, its motion for return of property will be fully satisfied, and its Rule 41(e) motion will be moot in its entirety. If, on the other hand, the district court permits the government to retain the photocopies, petitioner will be free to litigate further the retention question. Accordingly, review by this Court of the questions presented in the petition would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1983

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[2]Because the FBI did not make copies of the pornographic materials and all of the originals have been returned to petitioner, the case is clearly moot as to these materials.

[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.